FILED
DEC 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-746

IN THE UNITED STATES SUPREME COURT

October Term, 1984

MARIA GUADALUPE NAVARRO,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Appellees have raised two primary objections to appellant's jurisdictional statement to which appellant takes this opportunity to reply. First, appellee, Agricultural

Labor Relations Board (ALRB), asserts that even if certain state action arguments are persuasive, this Court cannot consider them because they did not appear in appellant's original brief before the Court of Appeal, and were not made until appellant's petition for rehearing before that court. ALRB brief at 23-26. This inaccurate conclusion will be addressed below. Second, appellees raise again various misstatements of appellant's position regarding the presence of state action deriving from arguments found in Shelley v. Kraemer, 334 U.S. 1 (1948); Railway Employes' Department v. Hanson, 351 U.S. 225 (1956); and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). These misstatements will be corrected one more time, so that this Court will have the benefit of an undistorted presentation of appellant's position.

I

APPELLANT'S STATE ACTION ARGUMENTS FIRST MADE TO THE COURT OF APPEAL ON PETITION FOR REHEARING DO NOT FALL WITHIN THIS COURT'S BAN ON NEW FEDERAL QUESTIONS RAISED AFTER FINAL APPELLATE JUDGMENTS

Appellee, ALRB, seeks to force this Court to disregard the state action arguments made originally to the Court of Appeal in appellant's petition for rehearing arguing that

> "although Navarro did raise these additional [state action] arguments in her petition for rehearing to the California Court of Appeal, the state court was not required to consider them, and indeed, did not do so. The appellate court's opinion deals solely with the issues raised by Navarro and her co-petitioners before the case

was submitted for decision. This Court has recognized that, in such circumstances, the federal issue was never properly presented to the state court." ALRB brief at 25 (citation omitted).

Thus, appellee, ALRB, has attempted to create an appearance of impropriety by comparing appellant's new arguments to new federal questions. The case law does not support such a facile identification of arguments with underlying issues.

This very issue was addressed by the Court over 85 years ago in Dewey v. City of Des Moines, 173 U.S. 193 (1899), and recently rearticulated by the Court in Illinois v. Gates, ___ U.S. __, 76 L. Ed. 2d 527 (1983). Characterizing the Dewey decision as "the fullest treatment of the subject,"

the Gates Court went on to quote extensively in approval:

> "'[i]f [the Dewey court said] the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.'" Gates, 76 L. Ed. 2d at 536, citing

Dewey, 173 U.S. at 197-98 (emphasis added).

Appellant clearly raised the question of the presence of state action in the operation of the union security agreements at issue here throughout the state appellate process. This Court has made it plain that it will not, as appellees desire, penalize the fuller presentation of supporting arguments for disputed issues and questions that its jurisdiction pursuant to 28 U.S.C. § 1257 affords.

II

APPELLANT'S EXPOSITION OF THIS COURT'S STATE ACTION CASES ACCURATELY REFLECTS THE LAW

A. Appellees Continue to Misstate the Gravamen of Appellant's State Action Arguments

ALRB once again mischaracterizes appellant's state action contentions. ALRB writes: "Navarro argues that state action is present in

the fact that the ALRA does not prohibit union security provisions requiring union membership." ALRB brief at 3 (emphasis added). Nowhere has appellant advanced any such thesis, nor can her state action arguments legitimately be so characterized. Appellant's state action position is that the State of California in creating the legislation subsequently known as the Agricultural Labor Relations Act (ALRA), codified in the California Labor Code, has positively placed its "imprimatur" on the impairment of Ms. Navarro's fundamental right of freedom of association, and on her fundamental right to pursue her legitimate livelihood. This has been accomplished by a new statutory scheme that has several facets. It creates a state-sponsored cause of action for the breach of a contractually secured union

security agreement. Labor Code § 1165(a). It empowers the statutorily created ALRB to protect and foster union security agreements through cease and desist orders and the imposition of make-whole remedies. Labor Code § 1160.3. And it authorizes the state judiciary to use its full contempt power to procure conformity to those same union security agreements through the enforcement of ALRB orders. Labor Code § 1160.8. Appellant raises no complaint against the State of California's failure to act under such circumstances.

B. The Union Security Provisions of the ALRB Are Not Merely Passive and Lacking in Legal Compulsion; Even If the Union Security Provisions of the ALRB Had Effected No Change in California Law, State Action in the Operation of Union Security Agreements Would Be Present

Appellees have repeatedly striven to avoid appellant's state action arguments by denying that there has been any action at all. Appellee, ALRB, states:

"[T]he significance of the exclusionary cast of the statute is not only in the fact that the statute does not compel anything. ...

"... [T]he plain fact is that section 1153(c) did not change California law, and this is the deeper significance of the statute's passive character." ALRB brief at 6-7 (emphasis in original).

The protective and supportive statutory provisions as shown above (see Section II.A., supra) clearly belie these assertions. This Court has faced self-serving denials of state activity of this sort before, and cast them aside. See Shelley v. Kraemer, supra. The assistance actively provided to union security agreements by the

sections of the ALRA indicated above (see Section II.A., supra) are well within the Shelley rule as "manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.'" 334 U.S. at 14, citing the Civil Rights Cases, 109 U.S. 3 (1883).

That the state action occurs in relation to private agreements is not determinative. The assistance provided by the above sections of the ALRA to unions and employers in supporting, protecting, and enforcing their security agreement is subject to constitutional protections as Shelley requires: "Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a

private agreement." 334 U.S. at 20 (emphasis added).

Appellees' repeated assertions of the Act's "passivity" are almost incredible in the light of its legislative history. The very words of the architect of this statute referring to the ALRB's power of approval concerning the reasonableness of any individual use of the union security termination power dispel this notion:

> "[This section] gives to the Board the power to look into the internal workings of every labor organization that files under this Act and has any kind of activity wherein there is a complaint lodged against the labor organization because they are asking one of their members to do something that does not comport with fairness

and due process. Now, that is a tremendous power that labor organizations traditionally have never been willing to give up and have never been willing to give to a board and, in effect, this language is giving to the board that power ...." Hearings on Senate Bill 1 Before the Senate Industrial Relations Committee on May 21, 1975, at 71-72 (emphasis added).

In implementing this heightened level of state involvement in labor/management relations, the lower court required the performance by the board of at least 11 separate tests for the reasonableness of a union's termination decision under the security provisions of the Act. See Pasillas v. Agricultural Labor Relations Board;

United Farm Workers (Real Parties in Interest), 156 Cal. App. 3d 312, 356 (1984); Appellant's Jurisdictional Statement, Appendix at B-51-52. Power so broad and unprecedented reveals that the final board-approved action of the union should be treated as that of the state itself. Cf. Jackson v. Metropolitan Edison Co., 419 U.S. at 351. See also Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919 (11th Cir. 1982), cert. denied, 459 U.S. 971 (1982) (superintendency by state housing finance agency of tenancy termination decisions demonstrates state action).

But appellees continue to argue that "it is precisely because section 1153(c) did not change the [California] law in this respect, and does not create new rights or obligations, that Navarro's constitutional

claims must fail." ALRB brief at 8 (emphasis added). This contention ultimately rests on the belief that California's pre-ALRA common law position of benign neutrality toward union security agreements can form no basis for a finding of state action. But this thinking was rejected in Shelley. Neutral state processes may not be used to impair fundamental rights. Where these fundamental rights are so impaired, there can be no benign neutrality.

Quoting extensively from Gabaldon v. United Farm Workers Organizing Committee, 35 Cal. App. 3d 757 (1973), the Court of Appeal in Pasillas found that the pre-ALRA policy of the State of California was "to encourage and protect union shop agreements," 156 Cal. App. 3d at 345, appellant's Jurisdictional Statement, Appendix

at B-35, through its evenhanded enforcement, protection, and support for all union contract provisions. Pasillas, 156 Cal. App. 3d at 346; appellant's Jurisdictional Statement, Appendix at B-36. But where fundamental rights are concerned, such "evenhanded" support and protection constitute encouragement of such agreements and thus state action. Reitman v. Mulkey, 387 U.S. 369 (1967). The fact that this state action was imbedded in California's common law of labor/management relations which preceded ALRA is a distinction without a difference, for judicial enforcement of common law policy is also state action. American Federation of Labor v. Swing, 312 U.S. 321 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bridges v. California, 314 U.S. 252 (1941).

C. State Action Is Found Under Hanson, Ellis, and Recent Federal Decisions

Appellees consume a total of 15 pages lecturing the Court on their theory of the Hanson line of cases. Their argument runs: the Railway Labor Act (RLA), under which Hanson was decided, expressly overrode any opposing state right to work legislation, thus presenting state action. Therefore, where fundamental rights are impaired by operation of the RLA in a state with a right to work law, constitutional protection is available for the aggrieved employee. But, where the employee lives and works in a state with no right to work law for the RLA to override, no state action is present, and he has no constitutional protection of his fundamental rights. Likewise, the National Labor Relations Act, with no statutory override provision of local



right to work laws, presents no state action, leaving its covered workers without constitutional protection of their fundamental rights. Appellees thus argue in effect that the RLA creates a specially favored class of workers who are fortunate to be included in RLA trades and to live in right to work states. This dichotomy makes no sense.

The gravamen of Hanson is as follows. Where the government has taken a position of support, has placed its power, prestige, and authority behind a particular result, thus placing its "imprimatur" on an organized societal action of any sort, state action is present. This state action definition was articulated in Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971):

> "[I]f the company declined to discharge the plaintiff, the union could institute a federally supported suit, if not an unfair labor practice charge, for failure to live up to its bargaining agreement. ... In the case at bar the union's demand that the plaintiff be discharged is as federally supported as was the similar demand in Hanson." Id. at 17 (emphasis added).

Clearly, this consistent interpretation of the presence of governmental action in union security agreements ought to control the present case as well.

Appellees dispose of this Court's holding in Ellis v. Brotherhood of Railway, Airline, and Steamship

Clerks, 52 U.S.L.W. 4499 (Apr. 24, 1984), in a single footnote. They suggest therein that this Court never considered the state action issue and thus did not mean to address the issue even by implication. To the contrary, appellant believes that she in no way misstates the basis for the Court's holding in Ellis when she argues that the Court consciously accepted the propriety of the Linscott reasoning in granting to all workers subject to the RLA the constitutional protection of their fundamental rights in the context of union security agreements. Confirmation that other courts are also discarding hypertechnical obstacles to protection of workers' fundamental rights under union security agreements may be found in Beck v. Communications Workers of America, 468 F. Supp. 93 (D. Md. 1979); Havas v. Communications

Workers of America, 509 F. Supp. 144 (N.D.N.Y. 1981); and Lykins v. Aluminum Workers International Union, 510 F. Supp. 21 (E.D. Pa. 1980).

CONCLUSION

For the above reasons, appellant asks this Court to find state action, and to note jurisdiction so that it can act to protect appellant's fundamental rights still at issue.

December 14, 1984.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Donna M. Boek, being first duly sworn, says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 555 Capitol Mall, Suite 350, Sacramento, California 95814; that affiant served the required number of copies of the attached REPLY BRIEF on each of the following, by placing the same in an envelope addressed as follows:

DANIEL G. STONE
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Deputy Solicitor
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that each of said envelopes was then, on December 14, 1984, sealed and deposited in the United States mail at Sacramento, California, with the postage thereon fully prepaid; and that there is delivery service by United States Mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

All parties required to be served have been served.

/s/ DONNA M. BOEK
DONNA M. BOEK

Subscribed and sworn to
before me this 14th day
of December, 1984

/s/ LINDA S. SCHAUPP
Notary Public in and for the County
of Sacramento, State of California